IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1355

PENTHOUSE INTERNATIONAL, LTD., a corporation; ROBERT GUCCIONE; LOWELL BERGMAN; and JEFF GERTH,

Petitioners,

v.

RANCHO LA COSTA, INC., a Nevada corporation; LA COSTA LAND COMPANY, an Illinois corporation; LA COSTA MANAGEMENT COMPANY, a California corporation; LA COSTA COMMUNITY ANTENNA SYSTEM, INC., a California corporation; PARADISE HOMES, INC., a California corporation; MERV ADELSON and IRWIN MOLASKY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

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Petitioners, Penthouse International, Ltd., Robert Guccione, Lowell Bergman and Jeff Gerth, respectfully pray that a writ of certiorari issue to review the memorandum and notice of intended decision dated April 5, 1976, and the memorandum opinion and order, dated June 25, 1976 and filed July 12, 1976, of the Superior Court of the State of California for the County of Los Angeles, denying petitioners' motions for summary judgment in a libel action with respect to respondents Rancho La Costa, Inc., La

Costa Land Company, La Costa Management Company, La Costa Community Antenna System Inc., Paradise Homes, Inc., Merv Adelson and Irwin Molasky.

Opinions and Orders Below

The unreported memorandum opinion and order of the Superior Court of the State of California for the County of Los Angeles, dated and filed November 19, 1975, initially granting the motions of petitioners Lowell Bergman, Jeff Gerth and Penthouse International, Ltd., for partial summary judgment with respect to the respondents and the other plaintiffs on the ground that they were public figures and an inextricable part of the La Costa story, a matter of general or public interest, is set forth in Appendix A hereto.

The unreported memorandum and notice of intended decision of the Superior Court of the State of California for the County of Los Angeles, dated April 5, 1976, granting all of the petitioners' motions for summary judgment with respect to plaintiffs Allard Roen and M. B. Dalitz, but denying summary judgment as to public figure status with respect to the respondents, is set forth in Appendix B hereto.

The unreported subsequent order of the Superior Court of the State of California for the County of Los Angeles, dated June 25, 1976 and filed July 12, 1976, adhering to the April 5, 1976 memorandum and notice of intended decision, is set forth in Appendix C hereto.

The unreported order of the Court of Appeals, Second Appellate District, Division One, entered on December 10, 1976, denying a petition for a writ of mandate, is set forth in Appendix D hereto.

The unreported order of the Supreme Court of California, dated January 5, 1977, denying a petition for hearing, is set forth in Appendix E hereto.

Jurisdiction

The order of the Superior Court of the State of California for the County of Los Angeles dated June 25, 1976, adhering to that court's prior memorandum and notice of intended decision, was filed on July 12, 1976. On December 10, 1976, the Court of Appeals, Second Appellate District, Division One, denied a timely petition for a writ of mandate. Thereafter, on January 5, 1977, the Supreme Court of California, without rendering an opinion, denied a timely petition for a hearing and writ of mandate. The decision of the Superior Court denying summary judgment as to the respondents is therefore final as to the federal constitutional issues involved and is not subject to further review in any state court. This petition for certiorari was filed within 90 days of the date of the denial of the petition for a hearing by the Supreme Court of California.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3) on the ground that the decision of the Superior Court of the State of California abridged the petitioners' rights of free speech and of the press and deprived them of rights without due process of law guaranteed to them by the First and Fourteenth Amendments to the United States Constitution.

A decision on the merits now in favor of the petitioners would terminate the litigation. On the other hand, a failure to review will leave unanswered important questions of freedom of the press, will leave intact a state court's conflicting and erroneous interpretation of the federal constitutional principles established in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974), and reaffirmed in *Time, Inc.* v. *Firestone*, 424 U.S. 448 (1976), and will relegate the press to operating within the shadows of severe civil sanctions which chill the unfettered exercise of First Amendment freedoms to investigate, uncover and report criminal activities and other public controversies. *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975).

Questions Presented

1. Was the court below in error under the First Amendment because of its failure to find respondents public figures to whom an "actual malice" standard of proof applied since they enjoyed broad access to the media, were prominent in the affairs of society and had extensive voluntary involvement in a controversy concerning important public issues?

2. Was the court below in error in interpreting this Court's decision in *Time, Inc.* v. *Firestone,* 424 U.S. 448 (1976), as effecting a change in this Court's decision in *Gertz* v. *Robert Welch, Inc.,* 418 U.S. 323 (1974), with respect to the public figure principle?

3. Was the court below in error under the First Amendment because of its failure to find that actual malice has not been established with respect to the respondents?

Constitutional Provisions Involved

The constitutional provisions involved are the First and Fourteenth Amendments, United States Constitution, Amendment I, Amendment XIV, § 1.

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances." U.S. Const., amend. I.
>
> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State

> deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

Statement of the Case

The corporate petitioner, Penthouse International, Ltd., is the publisher of the internationally distributed Penthouse Magazine. The individual petitioners are Robert Guccione, editor and publisher of Penthouse International, Ltd., and Lowell Bergman and Jeff Gerth, investigative reporters with a primary interest in the area of organized crime.

The corporate respondents are the owners and/or operators of certain facilities located in Carlsbad, County of San Diego, California, namely: Rancho La Costa, Inc., owner of a hotel, spa and other recreational facilities; La Costa Land Company, owner of improved and unimproved real property; La Costa Management Company, manager and lessor of condominium units and homes; La Costa Community Antenna System, Inc., installer of CATV systems; and Paradise Homes, Inc. which performs construction work for residential housing. La Costa Management Company and Paradise Homes, Inc. were defunct prior to the publication of the Penthouse article. The individual respondents, Merv Adelson and Irwin Molasky are stockholders of the respondent corporations. Mr. Adelson is the president of Rancho La Costa, Inc.

The respondents and Allard Roen and M.B. Dalitz brought this action for libel based upon an article jointly authored by Lowell Bergman and Jeff Gerth which appeared in the March 1975 issue of Penthouse Magazine entitled "La Costa—the Hundred-Million-Dollar Resort with Criminal Clientele". They filed the complaint in this action on May 25, 1975, alleging that the text of the article, which dealt with the La Costa resort and its relationship

to the Teamsters Union, government and organized crime, maliciously defamed and disparaged them by imputing to each of them various specific statements relating to criminality and illegal operations. They also charged that the pictorial representations accompanying the article and the headnote above the article and on the cover were libelous *per se*. On May 27, 1975, shortly after the action was commenced, the respondents, together with Dalitz and Roen, held a press conference at which their spokesman Adelson announced the filing of a $540,000,000 libel suit against the petitioners for the article which was characterized as painting the plaintiffs as "gangsters" and involved with "unsavory events and people," ranging from Lucky Luciano to Watergate.

The answers of the petitioners* each denied that there had been any defamation, asserted that the allegedly libelous statements contained in the article were true and claimed privileges under the First Amendment of the Constitution of the United States and under Article I, Section 2 of the Constitution of the State of California and a conditional privilege under Section 47 of the California Civil Code.

On September 2, 1975, petitioners Penthouse, Gerth and Bergman filed a motion for partial summary judgment requesting the court below to declare that the actual malice standard set forth by the Supreme Court in *New York Times* v. *Sullivan*, 376 U. S. 254 (1964), apply under the constitutional defenses asserted by them and that each of the plaintiffs was a "public figure" or, alternatively, that under California law plaintiffs were so involved with matters of public interest that in any event the actual malice standard applied under the affirmative defense of conditional privilege.

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* The answer of petitioner Penthouse was filed June 25, 1975 and the answers of petitioners Gerth and Bergman on July 2, 1975. The answer of petitioner Guccione was filed December 30, 1975, the court below having decided for the first time on December 15, 1975 that adequate service of process nad been effected as to him.

On November 19, 1975 the motions of Penthouse, Gerth and Bergman were granted by the Honorable Thomas W. LeSage, who concluded that:

> "The evidence is overwhelming that the corporate plaintiff, La Costa,* and the individual plaintiffs are public figures, and that the La Costa story is a matter of general or public interest within the rules of *New York Times* v. *Sullivan*, 376 U. S. 254; *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130; and *Rosenbloom*, 403 U.S. 29; and the Court so finds." (Appendix A)

Asserting that the identity of the individual plaintiffs as the founders of La Costa, who financed the resort through the Teamsters Pension Fund, was clear from affirmations of the individual plaintiffs themselves and from documentation presented to the court below, Judge LeSage determined that "Measured by *Gertz*, the individual plaintiffs must be judged an inextricable part of the La Costa story, and thus public figures by the *Gertz* standard." He, moreover, opined that this case, "more than any other case brought to its attention, merits a positive reaffirmation of the constitutional right of freedom of the press." (Appendix A).

Thereafter, on December 5, 1975 the authors moved for final summary judgment dismissing the complaint on the ground, *inter alia*, that there was no triable issue of fact as to malice in the publication of the article. By motion filed on January 5, 1976, Guccione and Penthouse also moved for final summary judgment dismissing the complaint on the grounds, *inter alia*, that plaintiffs were "public figures" and that there was no malice in the publication of the article. All of the motions were supported by affidavits, books, depositions and other transcripts, articles, briefs, and papers lodged with the court below in connection with the earlier partial summary judgment motion

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* Although Judge LeSage referred to a single corporate plaintiff, he granted the motions as to *all* plaintiffs.

and by additional materials submitted by the authors on their motion for final summary judgment and submitted by Penthouse and Guccione for their companion motions.

On April 5, 1976, Judge LeSage issued a memorandum and notice of intended decision granting the motions for summary judgment with respect to plaintiffs Dalitz and Roen, holding that "plaintiffs Dalitz and Roen are clearly public figures under all of the authorities and said plaintiffs have failed to show malice." However, the court below denied the motions for summary judgment with respect to the respondents, merely stating that:

> "Triable issues arise under the *Firestone* case; also, the juxtaposition of the firearms and graphics accompanying the PENTHOUSE article is a factor in the Court's decision on this phase of the case." (Appendix B)

In the course of the decision, it was observed that:

> "The central theme of the authors is the alleged entente from time to time and from place to place between legal business and suspect funds, a theme of national concern since at least the days of the Kefauver Committee. . . .
>
> "Further, LA COSTA is a cultural and economic phenomenon of this society. As disclosed by evidence from both sides in this case, such a phenomenon attracts visitors, features personalities of the sports, entertainment and political worlds and inevitably provokes journalistic interest and comments, favorable and unfavorable. The constitutional right of freedom of the press would, indeed, be feeble if it should be precluded from fair comment and probing on such matters." (Appendix B)

The court below then stated that "the standards governing such comments have significantly changed from *Rosenbloom* to *Firestone* on the federal level, and remain to be authoritatively defined on the state level." While the court

below noted that "neither *Gertz* nor *Firestone* excludes the application of the public-figure principle to individuals whose achievements have attracted notoriety or general fame in the community", the opinion failed to mention that, in addition, neither *Gertz* nor *Firestone* excludes such application to private individuals "who have thrust themselves to the forefront of a particular public controversy in order to influence the resolution of the issues involved." (*Firestone*, 424 U.S. at 453; *Gertz*, 418 U.S. at 345).

The court below moreover opined that "summary judgment must be denied where triable issues of fact are presented on the issues of malice or public-figure standing", citing *Goldwater* v. *Ginzburg*, 414 F.2d 324 (2d Cir. 1969), and *Buckley* v. *Esquire, Inc.*, 344 F.Supp. 1133 (S.D.N.Y. 1972). These cases involved *only* the issue of malice since Goldwater was a public official and Buckley a public figure. The court below also mentioned a group of state and federal cases which stressed the latitude of press comment to include vehement, caustic and even sharp attacks on public officials and public figures, including rhetorical hyperbole, vigorous epithet and ridiculing depiction and caricature.

The effect of this decision was to reverse the earlier finding of the court below that the respondents were public figures at least for the limited purposes of the article, and to fail to make any determination as to whether or not the malice standard applied or had been met with respect to them.

The court below instructed counsel to file any objections to or concurrence with its intended rulings and indicated an interest in analysis and summary. The memoranda for all parties reflected a desire for clarification; however, by order dated June 25, 1976 and filed July 12, 1976, the court below adhered to its position as to summary judgment, stating:

> "The Court only adds that a necessary premise of the intended decision and this order is that there are

triable issues of fact with respect to whether or not all the plaintiffs (except Mr. Dalitz and Mr. Roen) are public figures." (Appendix C)

This petition for a writ of certiorari is addressed to the Superior Court of the State of California for the County of Los Angeles because both the appellate court and the highest state court have declined to review the Superior Court decision (Appendices D and E).

Reasons for Granting the Writ

We respectfully submit that a writ of certiorari should be granted to review the decision of the court below on the grounds that it has erroneously applied this Court's decision in *Time, Inc.* v. *Firestone*, 424 U.S. 448 (1976), to deprive petitioners of important constitutional rights, forcing them to proceed to trial on erroneous theories of law, and precipitating unnecessary confusion as to the meaning and effect of the *Firestone* opinion. If the errors of the court below remain uncorrected, the petrifying effect of the decision will continue to intimidate the members of the press from freely performing their vital social functions of investigating, uncovering and reporting on criminal activities and other matters of clear public interest in violation of their First Amendment freedoms.

I.

The Court Below Erroneously Decided that Triable Issues of Fact Exist with Respect to Public Figure Status of the Respondents in Violation of Petitioners' Constitutional Rights.

The critical issue of whether or not the respondents have acquired the status of public figure for purposes of their libel action is a question of paramount constitutional significance which, if answered in the affirmative, will be dispositive of this case. The constitutional privilege framed by the seminal case of *New York Times* v. *Sullivan*, 376 U. S. 254 (1964), and extended by later cases, prohibits a public figure from recovering damages for defamatory falsehood unless he proves by clear and convincing evidence that the statement was made with "actual malice". However, by declining to find respondents public figures as a matter of federal law, the court below has improperly subjected the petitioners to the risk of an adverse determination of this pivotal question and ultimate decision based upon negligence principles alone.

1. The court below abused its proper function by abstaining from a legal conclusion as to whether all plaintiffs were public figures. In vacating its earlier grant of partial summary judgment as to all plaintiffs but Dalitz and Roen, stating that the public figure question presents triable issues of fact, the court below radically departed from settled authority and case law. This Court clearly established the correct rule in *Rosenblatt* v. *Baer*, 383 U.S. 75, 88 (1966):

> "[I]t is for the trial judge in the first instance to determine whether the proofs show [plaintiff] to be a 'public official' [or a public figure]."

The court below had before it a record replete with relevant material to enable it to make this determination.*

2. The court below misconstrued the *Firestone* case, determining that it had changed the *Gertz* public figure doctrine. While the court below ruled the plaintiffs Dalitz

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* At least two district court opinions, relying on *Rosenblatt*, have found that while "the issue of whether a plaintiff in a defamation action is a public figure poses a mixed question of law and fact, it is nevertheless one for the Court, not the jury, to determine." *Rosanova* v. *Playboy Enterprises, Inc.*, 411 F. Supp. 440, 444 (S.D. Ga. 1976); *Hotchner* v. *Castillo-Puche*, 404 F. Supp. 1041, 1045 (S.D.N.Y. 1975).

and Roen are "clearly public figures under all of the authorities, and said plaintiffs have failed to show malice," it incongruously declined to enter a similar order with respect to the respondents, merely stating that triable issues arise under *Firestone*. However, because there is no basis for differentiation among the plaintiffs with respect to their involvement with the La Costa resort (and none was offered by the court) and *Firestone* reaffirms the principles of *Gertz* earlier applied by the court below in granting partial summary judgment as to all the plaintiffs, there is an immediate need for clarification in order to rectify the erroneous, unfounded and constitutionally impermissible treatment of the public figure issue.

The *Firestone* decision expressly adopts the language of *Gertz* to describe that class of libel plaintiffs upon whom the actual malice burden should rest as:

> "a public officer or a public figure who might be assumed to 'have voluntarily exposed [himself] to increased risk of injury from defamatory falsehood' . . ." 424 U.S. at 456.

Whether a libel plaintiff may fairly be said to have assumed that risk is a function of his conduct in connection with a public issue such as entitles press comment to the constitutional privilege. The cases are harmonious on this point.

In *Curtis Publishing Co.* v. *Butts,* 388 U. S. 130 (1967), a case specifically referred to in both *Firestone* and *Gertz,* Chief Justice Warren, in a concurring opinion adopted by a majority of this Court, reasoned that the importance of a person in the context of an issue of public concern was the proper determinant of whether the increased risk of defamation was warranted. In that connection he observed that there was no basis for distinguishing between "public figures" and "public officials" stating:

> "that although they are not subject to the restraints of the political process, 'public figures', like 'public officials', often play an influential role in ordering society. And surely as a class these 'public figures' have as ready access as 'public officials' to mass media of communication, both to influence policy and to counter criticism of their views and activities. Our citizenry has a legitimate and substantial interest in the conduct of such persons, and freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of 'public officials'." 388 U.S. at 164.

Mr. Justice Harlan's opinion in *Butts* also focused upon a public figure's capacity to rebut criticism. He found that "Butts may have attained that status by position alone [as athletic director of the University of Georgia] and Walker by the purposeful activity amounting to a thrusting of his personality into the 'vortex' of an important public controversy." The key to Justice Harlan was that "both commanded sufficient continuing public interest and had sufficient access to the means of counterargument to be able 'to expose through discussion the falsehood and fallacies' to the defamatory statements." 388 U.S. at 155.

This Court in *Gertz,* referring to Mr. Chief Justice Warren's opinion, stated that in the *Butts* case

> "[t]he Court extended the constitutional privilege announced in [*New York Times*] to protect defamatory criticism of non-public persons who 'are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.'" 418 U.S. at 336-37.

This Court then similarly acknowledged that, like public officials, a public figure "must accept certain necessary consequences of that involvement in public affairs. He runs the risk of closer public scrutiny than might otherwise be the case." That increased exposure is not unfairly imposed because "[p]ublic officials and public figures

usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy." 418 U.S. at 344.

In *Gertz* a public figure was defined in the following manner:

> "For the most part those who attain [public figure] status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment." 418 U.S. at 345.
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> ". . . [Public figure] designation may rest on either of two alternative bases. In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case, such persons assume special prominence in the resolution of public questions." 418 U.S. at 351.

This Court expressly recognized that in laying down "broad rules of general application," which "necessarily treat alike various cases involving differences as well as similarities . . . not all of the considerations which justify adoption of a given rule will obtain in each particular case decided under its authority." 418 U.S. at 343-44.

In *Gertz* and *Firestone* neither libel plaintiff met the test of a public figure for all purposes. This Court therefore considered the nature and extent of each plaintiff's conduct

in connection with the particular controversy giving rise to the alleged defamation and focused on the type of prominence of the libel plaintiff, the manner and degree of his involvement in the controversy, and the legitimacy of the public interest in the controversy.

In *Gertz* the alleged defamation charged Gertz with having been involved in a Communist plot to discredit the police. This Court found that Gertz, although he had achieved some local prominence as an attorney, had "played a minimal role" in the controversy giving rise to the defamation and his "participation related solely to his representation of a private client." He took "no part in the criminal prosecution" of the policeman, nor had he discussed either the criminal or civil litigation with the press. Although it was specifically held that the controversy was a matter of public interest, this Court found that Gertz "plainly did not thrust himself into the vortex of this public issue, nor did he engage the public's attention in an attempt to influence its outcome." 418 U.S. at 352.

In *Firestone,* the alleged defamation charged Mrs. Firestone with having been divorced for adultery. This Court found that Mrs. Firestone, although she may have attained some local prominence socially, and was intimately involved with the litigation which she instituted, was not involved in "the sort of 'public controversy' referred to in Gertz even though the marital difficulties of extremely wealthy individuals may be of interest to some portion of the reading public." In addition, the fact that Mrs. Firestone "was compelled to go to court by the State in order to obtain legal release from the bonds of matrimony" did not constitute a voluntary participation in the controversy. 424 U.S. at 454.

In *Gertz,* therefore, although the controversy centered on a matter of legitimate public interest, Gertz lacked the requisite intimate involvement with the controversy. In *Firestone,* although Mrs. Firestone was intimately involved

with the controversy, her involvement was not voluntary and the controversy in any event was not a public issue.

Mr. Justice Powell in his concurring opinion in *Firestone* took pains to indicate that "[a] clear majority of the court adheres to the principles of *Gertz.*" 424 U.S. at 464. Further, in *Firestone,* while declining to grant the press a blanket privilege for *all* reports of judicial proceedings, this Court specifically advised that "participants in some litigation may be legitimate 'public figures', either generally or for the limited purpose of that litigation," and as to them, the *Gertz* test was applicable. This Court reaffirmed that the *Gertz* test, which eschewed a subject matter test for one focusing upon the character of the defamation plaintiff,

> "provides an adequate safeguard for the constitutionally protected interests of the press and affords it a tolerable margin for error by requiring some type of fault." 424 U.S. at 457.

The court below, however, contrary to the language of the *Firestone* opinion, inexplicably read *Firestone* as departing from the rulings of *Gertz* to such a radical extent that it was compelled to reverse its earlier determination. By its earlier decision, the court below correctly found that the respondents were public figures under *Gertz* as a matter of law, at least for the limited purposes of the La Costa controversy—a matter of public interest—based upon their "inextricable" involvement with the La Costa resort which they admittedly founded and control. The court's subsequent abandonment of that finding cannot be explained by the intervening decision in *Firestone.*

The decisions which have followed in the wake of *Firestone* have rejected the suggestion or implication that anything in *Firestone* erodes the principles adopted in *Gertz.* To the contrary, the courts since *Firestone* have consistently applied the guidelines set forth in *Gertz.* See *Anderson* v. *Stanco Sports Library, Inc.,* 542 F.2d 638, 640

n.4 (4th Cir. 1976); *Trans World Accounts, Inc.* v. *Associated Press,* No. C-75-1166, n.4 (N.D. Cal., filed January 31, 1977); *Martin Marietta Corp.* v. *Evening Star Newspaper* Co., 417 F.Supp. 947, 957 (D.D.C. 1976); *Rosanova* v. *Playboy Enterprises, Inc.,* 411 F.Supp. 440, 444 (S.D. Ga. 1976).

All of these guidelines—broad press access, especial prominence in the affairs of society and extensive voluntary involvement in a controversy concerning important public issues by all of the respondents—were indisputably demonstrated to the court below. The court below had before it several factors highly probative of the respondents' access to the media and their ability to influence public issues. One was the testimony of Adelson, spokesman for the plaintiffs, which contained an admission of important contacts with public figures and public officials. Adelson said:

> "Now you know, in living the kind of lives that we have lived and being around the hotel business for many, many years we've met all kinds of people . . .
>
> "We've met Senators and Governors and judges and whatever. We met everyone by name and are introduced to them . . . We have a lot of friends and our circle of acquaintanceship is much larger than the ordinary person who is not exposed to that kind of thing . . . " (Tr. pp. 10-11).

The court was also mindful of the press conference which had been held by the respondents and Dalitz and Roen on May 27, 1975 announcing to the public their libel action through newspaper, radio and television. Present were representatives from the *Los Angeles Sun,* the *Los Angeles Times, Variety,* and KFWB, KNBC, KNXT and the Associated Press. Six radio stations, five television stations and at least 120 newspaper reports in 23 different states carried the story of the plaintiffs' libel suit against Penthouse, Guccione and the two authors. In addition, the court below had the extensive press clipping files kept by all the plaintiffs and other media items amassed

by the petitioners concerning the respondents, as well as Dalitz and Roen.

The court below also had before it ample evidence that the respondents had thrust themselves to the forefront of public controversies surrounding them, jointly and severally, and invited public scrutiny in many ways. For example, to finance the first DRAM venture together, the Sunrise Hospital, Adelson and Molasky sought out the Teamsters Pension Fund loans (Adelson Tr. 757-8) and thereby evoked a storm of national criticism of such intensity that they were required to mount a public relations campaign to counter it (Adelson Tr. 58). Obstinately persisting in this involvement they invited continued adverse comment by again choosing the scandal-ridden Pension Fund as the source of a series of loans for La Costa totalling $60,000,000 and again inducing the sustained national adverse reaction. "I think that in most cases La Costa received unfavorable publicity because of its borrowings from the Pension Fund" (Adelson Tr. 1117-8).

The court below was moreover apprised that the respondents had attracted and invited public attention by the lavish nature of the La Costa resort they owned, which they widely publicized through five public relations agencies, a quarter-million dollar annual publicity budget, nationally televised sports tournaments and by associating themselves through free Presidential Memberships with well known personalities, inducing publicity in which Adelson and La Costa are prominently featured. Having fostered a profit-making enterprise featuring a star-studded clientele, they assumed the risk of press comment upon their notorious guests and associations as well.

Among the individual respondents, Adelson and Molasky, who have no criminal records, have most pointedly assumed the risk of adverse comment by and upon their continuing intimate business and personal involvements with confessed criminals Dalitz and Roen. By their sedulous refusals, in the face of 20 years of withering criticism in the

press, books, other media and by law enforcement agencies, to disassociate themselves from these persons, they have voluntarily thrust themselves into the forefront of the controversies surrounding Dalitz and Roen as allies vouching for their colleagues. Indeed, over two decades of inextricable business involvement as equal partners in no less than 27 entities with net assets of over $100,000,000, it was Adelson who persisted in bringing each and every such investment opportunity to Dalitz and Roen (Adelson Tr. 886).

It was Adelson and Molasky's same stubborn adherence to their involvement with Dalitz and Roen which reaped the whirlwind of obloquy so great that it tainted their contributions to Mayor Bradley's campaign and required that they be returned.

Adelson was asked during his deposition:

> "Q. Have you ever thought of disassociating yourself from Mr. Dalitz? A. No.
>
> Q. Have you ever thought of ceasing to do business with him because he had so often been characterized as an underworld figure? A. . . . I repeat, I know what Mr. Dalitz is, I have been associated with him for more than 20 years . . ., I know the facts.
>
> Q. Have you ever discussed with any of your other partners, Mr. Roen or Mr. Molasky, whether it would not best serve your reputation to disassociate yourselves from Mr. Dalitz? A. No." (Adelson Tr. 1112-3).

Upon nearly identical facts of associations with the Teamsters and underworld figures and attendant publicity, the first federal post-*Firestone* libel case granted summary judgment dismissing the action, holding plaintiff to be a public figure despite the absence of any criminal convictions. *Rosanova* v. *Playboy Enterprises, Inc.*, 411 F. Supp. 440 (S.D.Ga. 1976).

Similarly, in *Martin Marietta Corp.* v. *The Evening Star Newspaper Company*, 417 F. Supp. 947 (D. D. C. 1976), a

libel action by a corporation for publication of a newspaper story that Defense Department personnel had been entertained at a hunting lodge leased by the plaintiff and that two prostitutes attended the party and one was paid $3,000 for her services by a Martin Marietta representative, the plaintiff urged that it had "refused to thrust itself into this controversy. . . ." The court, however, granted the defendants' motion for summary judgment and specifically found the plaintiff to be a public figure for the range of issues involved in the challenged article because of its access to the media and its voluntary association with such issues.

Rosanova and *Martin Marietta* confirm that the decision in *Firestone* is entirely compatible with the guidelines articulated in *Gertz* and underscore the total propriety of the original determination of the court below that the La Costa story is one of general public interest or concern and that all of the respondents are prominent in connection with that story. By their voluntary associations with the subject matter of the Penthouse article, they have assumed the risk of comment thereon and are thus public figures. Adelson is Chairman of the Board and a shareholder in all of the plaintiff corporations and Dalitz, Roen and Molasky are their directors and shareholders. All four are co-founders and owners. They have the power to set the standards and policies of the La Costa resort and control its clientele.

Rosanova and *Martin Marietta,* moreover, demonstrate that the construction of *Firestone* by the court below which led it to change its prior holding that all of the plaintiffs are public figures under *Gertz,* warrants review by this Court to rectify a state court error of constitutional magnitude, to dispel the confusion which now shrouds the press and to reinstate the constitutional imperatives of uninhibited, robust and wide-open debate about crime and related matters of public concern.

3. The court below apparently distinguished among the plaintiffs on a constitutionally impermissible basis. No basis for the differentiation was stated. In attempting to comprehend the different public figure treatment accorded Dalitz and Roen and the respondents, who were identically involved in the subject matter of the controversy, it appears that the only factor separating the former from the latter is admitted criminal involvement. No constitutionally permissible distinction can be drawn on this basis, for to do so is to impose upon the press the very burden of proving the truth of accusations which the "actual malice" standard was designed to avoid. As this Court observed in *Gertz:*

> "Our decisions recognize that a rule of strict liability that compels a publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship. Allowing the media to avoid liability only by proving the truth of all injurious statements does not accord adequate protection to First Amendment liberties. As the Court stated in New York Times Co. v. Sullivan, supra, at 279 . . . 'Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred.' The First Amendment requires that we protect some falsehood in order to protect speech that matters." 418 U.S. at 340-41.

Neither for the determination of malice *nor* for the initial determination of public figure status is truth the criterion. In *Rosanova,* the plaintiff alleged he had been libeled as a "mobster". However, the court held him to be a public figure because of his voluntary contacts and involvements with organized crime, the subject of the challenged *Playboy* article. The court expressly found that although Rosanova had been the subject of governmental investigations and criminal prosecutions, he had never been convicted of any crime. The court stated, however, that "At the present stage, it is not a question of

truth of the alleged falsehood," and granted summary judgment dismissing the complaint. 411 F. Supp. at 446.

While the general public figure test does not require as a premise for notoriety actual criminal conviction, the more limited test does not depend on notoriety at all. It turns on the nature and extent of one's involvements and contacts in the controversy giving rise to the defamation. As stated in *Martin Marietta,* 417 F. Supp. at 957 n. 8, "*Gertz* does not require a public figure for limited issues to be notorious, but merely to be in a position allowing him to influence the resolution of the issue." Obviously then the limited test does not require conviction of a crime in order for the constitutional privilege to obtain permitting mention of the plaintiffs as involved through La Costa with "mobsters" or "underworld figures."

The respondents have had a voluntary, intimate, prolonged and extensive involvement with the La Costa resort. Moreover, they have invited comment upon their various public activities and associations. As these were among the subjects of the Penthouse article, the comment therein was as much constitutionally protected as it was with respect to the admittedly criminal plaintiffs, since all were similarly in a position to influence the resolution of the issues.

4. The court below erroneously held that triable issues arose by virtue of the juxtaposition of the firearms and graphics accompanying the article. Although the court below seems to have viewed the graphics as relevant to determining the public figure status of the respondents, it is clear that such items bear no relation to fame or notoriety, prominence, press access, influencing the resolution of the issues, assumption of the risk of adverse comment or voluntary exposure. They do relate to the legitimate public issues aired in the article. They might also be relevant to a determination of defamation or malice, but did not serve to defeat the motions for summary judgment against

Dalitz and Roen and should similarly pose no bar to granting summary judgment against the respondents.

The illustrations accompanying the article were not complained of as libelous when viewed in connection with its text, but standing alone, as libelous *per se* of all of the plaintiffs. No picture appears on the cover of the magazine illustrating the article, merely the words "La Costa—Syndicate in the Sun" along with other titles. The main graphic comprises two pages and is a melange of concepts, virtually unintelligible unless viewed in the context of the article.

None of the individual respondents claims that the male figures contained in the illustration represents his likeness nor do they claim that the hands on the revolvers belong to any of them. The law concerning graphics is the same as that which relates to prose or other modes of expression (Calif. Civil Code § 345). *Arno* v. *Stewart,* 245 Cal.2d 955 (1966); *Blake* v. *Hearst Pubs.,* 75 Cal. App.2d 6, 9-10 (1946). Thus, even if the graphics, alone or in context, were susceptible of some defamatory meaning, the respondents were required to show that the libelous material applied to them in particular and not merely to the general class of persons associated with La Costa, either as owners, operators or guests.

Further, the respondents had to adduce "clear and convincing evidence" of malice concerning them in order to defeat the motions for sumary judgment. This Court has held that malice cannot be inferred from the "language" of the defamation itself and that to do so is "error of constitutional magnitude", *Greenbelt Coop. Pub. Assoc.* v. *Bresler,* 398 U.S. 6, 10 (1970); *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 288 (1964).

Before reaching the question of malice, the court below should have first determined whether the illustrations were defamatory at all. Where, as here, graphics say nothing in and of themselves, they must be read in connection with

the text they illustrate to determine whether, as a whole, they are susceptible of a defamatory meaning. *Washington Post Co.* v. *Chaloner*, 250 U.S. 290, 293 (1919). *Accord, Arno* v. *Stewart*, 245 Cal.2d at 959-60; *Blake* v. *Hearst Publications*, 75 Cal. App.2d at 9.

Respondents must also surmount a constitutionally imposed barrier which permits the press, in reporting on matters of public concern, to indulge in vigorous epithets and hyperbole to express its views without their being deemed libelous. Thus, the gun as a hyperbolic expression for political or financial power or the figure as a symbol for crime no more charges any plaintiff with a criminal act than the use of the term "blackmail" in an article with a column headed "Blackmail" which also charged a plaintiff with "unethical trade" and "skulduggery" in *Greenbelt Coop. Pub. Assoc.* v. *Bresler*, 390 U.S. at 18.

Although the court below cited the *Bresler* case and three others dealing with the latitude granted the press to make comments,* it still did not recognize that the only

* Summary judgment was granted in *Thuma* v. *Hearst Corporation*, 340 F.Supp. 867 (D. Md. 1972), where the court held that a description of a shooting as "cold-blooded murder," quoted in the allegedly defamatory newspaper accounts, was clearly hyperbole vehemently expressing the notion that the shooting was unjustified and unnecessary, and could not reasonably be regarded as meaning premeditated murder.

And in *Time, Inc.* v. *Johnston*, 448 F.2d 378 (4th Cir. 1971), the word "destroyed" quoted from Bill Russell's basketball coach to describe the devastating psychological effect of Russell's basketball ability upon the plaintiff was not susceptible of a literal reading and therefore, as a matter of law, not capable of defamatory meaning.

In *Yorty* v. *Chandler*, 13 Cal. App.3d 467, 471-72 (1970), the court held that a challenged cartoon which depicted Mayor Yorty in the company of four beckoning medical orderlies with grim expressions, one of whom concealed a straightjacket behind his back, was protected commentary on the mayor's political ambitions, observing: "To say so much with so little, the political cartoonist makes extensive use of symbolism, caricature, exaggeration, extravagance, fancy, and make believe".

issues the graphics raised were as to defamation or malice. Since no defamatory meaning can reasonably be discerned from the graphics nor have the respondents demonstrated malice in this respect, the mere presence of symbolic illustrations should have posed no bar to the granting of summary judgment.

II.

The Court Below Erroneously Failed to Apply a Malice Standard of Proof Under the First Amendment and Thus Erroneously Failed to Find that Actual Malice Had Not Been Established with Respect to the Respondents as a Matter of Law.

The decision of the court below is constitutionally infirm for implying that triable questions of fact prevent the conclusion that there has been no showing of actual malice as a matter of law under applicable federal principles. The errors committed by the court below in misconstruing *Firestone* were thus compounded by that court's failure to squarely address the malice issue. The respondents have utterly failed to satisfy the heavy constitutional burden of demonstrating that the alleged defamations were the product of actual malice.

The first definition of the actual malice standard was provided in *New York Times* itself:

> "The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. at 279-80.

The rule was extended in *Butts* to apply to "public figures":

> "We consider and would hold that a 'public figure' who is not a public official may also recover damages

> for a defamatory falsehood whose substance makes substantial danger to reputation apparent, on a show ing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers". 388 U.S. at 155.

To discharge this burden, it is incumbent upon a plaintiff to adduce evidence sufficient to show that statements were published with a "high degree of awareness of their probable falsity" tantamount to a "calculated falsehood." *Garrison* v. *Louisiana,* 379 U.S. 64, 74 (1964).

In *St. Amant* v. *Thompson,* 390 U.S. 727, 731 (1968), this Court declared:

> "Mr. Justice Harlan's opinion in Curtis Publishing Co. v. Butts, 338 U.S. 130, 153 . . . , stated that evidence of either deliberate falsification or reckless publication 'despite the publisher's awareness of probable falsity' was essential to recovery . . . in defamation actions. These cases are clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice."

The quantum of proof neecssary to sustain this burden must attain the maseure of "convincing clarity which the constitutional standard demands . . . [A lesser showing] would not constitutionally sustain [a libel] judgment . . . under the proper rule of law". *New York Times Co.* v. *Sullivan,* 376 U.S. at 285-86.

Here, the respondents utterly failed to satisfy their burden of proving the petitioner's awareness of the falsity

of the allegedly defamatory material "with convincing clarity" in order to prevent summary judgment from being entered. The court below had before it the deposition of the President of La Costa, respondent Adelson, who was spokesman for the entire group, in which he admitted that the respondents did not possess any facts or evidence in any sense adequate to meet the high constitutionally imposed standard of proof necessary to sustain a claim of actual malice.

The court below was also aware that the authors had made an extensive 18-month investigation as the basis for their article. This investigation was detailed, thorough, responsible, nationwide in scope and relied for its principal sources upon the most reputable law enforcement agencies, organs of the press and knowledgeable authorities. That investigation was, in turn, examined by the magazine's editors and its attorney who were satisfied with its thoroughness and with the responsibility of the statements made by the authors and relied on them for accuracy.

This Court stated in *St. Amant* v. *Thompson,* 390 U.S. at 733, that "[f]ailure to investigate does not in itself establish bad faith". If the negligible investigation performed in the *St. Amant* case was not constitutionally adequate to sustain a claim of "actual malice", it follows *a fortiori* that the very intensive and detailed investigation conducted by the authors in the instant case and the verification of this research by the publisher who had no reason to suspect the accuracy of the authors, is more than ample to defeat the unsupported contention of "actual malice."

The proof presented by the respondents and plaintiffs Dalitz and Roen to establish malice was a statement of the San Diego Sheriff that criminal activity did not exist at La Costa, which statement the authors investigated and discredited, a general statement by the Attorney General of California concerning his lack of knowledge of certain investigations at La Costa, and the affidavit of Professor

Robert Blakey who by his own averments disqualified himself from opining, either as an expert on crime or as a journalist, on the state of mind of the authors and publishers of the article.

The court below already determined on the basis of this record, which involves the same proof for each plaintiff, that two of them, Dalitz and Roen, failed to show malice. There being no sufficient evidence of actual malice, which is the proper constitutional standard to be applied in this case to any of the plaintiffs, the court below should have granted summary judgment with respect to the respondents as well.

Conclusion

In reversing its prior determination based upon *Gertz*, the court below has distorted the parameters of this Court's decision in *Firestone* which was not intended to undercut the constitutional principles articulated in *Gertz*. As a direct result, the decision of the court below at once deprives petitioners of constitutional protections and dampens the vigor with which the press seeks to penetrate the sealed doors of the criminal fraternity.

For the reasons stated, the petition should be granted.

Respectfully submitted,

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of Counsel

Dated: April 1, 1977

APPENDIX A

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

ORIGINAL FILED
Nov 19 1975
CLARENCE E. GABELL, County Clerk
Deputy

No. C 124 901

RANCHO LA COSTA, INC., a Nevada corporation, et al.,
Plaintiffs,

vs.

PENTHOUSE INTERNATIONAL, LTD., a corporation, et al.,
Defendants.

MEMORANDUM OPINION AND ORDER

The *Penthouse* article (March 1975) under consideration is entitled *"La Costa"*—"The Hundred-Million-Dollar Resort with Criminal Clientele."

The individual plaintiffs, Moe Dalitz, Allard Roen, Merv Adelson and Irwin Molasky (using the acronym DRAM), are said to have "founded" and "controlled" La Costa. The article describes loans from the Teamsters' Central State Fund and loans from the United States National Bank used to develop La Costa to national prominence.

The central theme of the article is the corporate plaintiff, La Costa, and the individual plaintiffs are among the many mentioned in connection with the history and promotion of La Costa.

Appendix A.

Traditional, even conservative, journals on the American publishing scene have commented of La Costa and DRAM:

> "The most dazzling monument to this bond between the Teamsters and organized crime is Rancho La Costa, a $100 million residential country club and health spa north of San Diego. . . . La Costa is financed in part by a $57 million loan from the Teamsters' Central States pension fund.
>
> "La Costa is controlled by four men, including Morris (Moe) Dalitz, a gambler and one-time bootlegger who holds a position of prominence in organized crime, and Allard Roen, who pleaded guilty to conspiracy to defraud thirteen years ago in a $5 million stock swindle." (Newsweek, August 18, 1975.)

And *Forbes,* in its article of August 15, 1975, entitled "Crime in the Suites" states:

> "Moe Dalitz was kingpin of the notorious Cleveland 'Purple Gang.' He made his money in racketeering, later bootlegging. Nowadays it's resort hotels. Dalitz, Allard Roen, Merv Adelson and Irwin Molasky (the DRAM group) today control the plush 5,600-acre La Costa resort complex located 30 miles south of the former Western White House. La Costa was financed in part by the Teamsters Union Central States Pension Fund. Additional financing was provided by Smith's bank, which in turn had about $20 million worth of Teamster deposits. The deposits were solicited by Senior Vice President Lew Lipton, a former restauranteur with underworld ties.
>
> "Loans to Rancho La Costa Inc. eventually appeared on the FIDIC's list of loans carried on the USNB books without adequate credit information. The guarantors were Dalitz, Doen and Molasky. According to reliable sources, the loans were roll-overs of $1-million credits involving 'finders' fees to a La Costa principal."

Appendix A.

The *New York Times* editorialized in its October 13, 1975 issue that:

> "La Costa itself is emblematic of the ties that have long made law-enforcement officials worry about the links between the teamsters and organized crime. Much of the resort's financing comes from the $1.4-billion Teamsters' Central States pension fund, and underworld figures are prominent among its owners and habitués. . . ."

(The documentation before the Court establishes many other similar comments.)

The evidence is overwhelming that the corporate plaintiff, La Costa, and the individual plaintiffs are public figures, and that the La Costa story is a matter of general or public interest within the rules of *New York Times* v. *Sullivan,* 376 U.S. 254; *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130; and *Rosenbloom,* 403 U.S. 29; and the Court so finds.

The identity of the individual plaintiffs and La Costa is clear from the documentation before the Court and is also affirmed by the declarations of the individual plaintiffs as well as, for example, Mr. Merv Adelson in his declaration in opposition to the motion affirms that he is president of the corporate plaintiff; that in the early 1960s he and Allard Roen, Irwin Molasky and Moe Dalitz purchased the La Costa acreage as an investment, ultimately assembling a total of about six thousand acres. Mr. Adelson outlines how he and his associates planned and developed La Costa and financed it through the Teamsters' pension fund and the United States National Bank of San Diego loans, loans which are, or were, being fully repaid. Mr. Adelson summarizes in his declaration, "I have related the true origin of La Costa, which was conceived by Irwin Molasky, Allard Roen and myself . . ."

In *Gertz* v. *Welch,* 418 U.S. 323, the United States Supreme Court was concerned with the defamation of a pri-

vate but prominent Chicago attorney who had participated honorably for years in community cultural, civic and legal affairs. In considering the application of the *New York Times* rule, the Court held with respect to the plaintiff, Gertz, "It is preferable to reduce the public figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation." (418 U.S. 352.)

Measured by *Gertz,* the individual plaintiffs must be judged an inextricable part of the La Costa story, and thus public figures by the *Gertz* standard.

The Court adds that the case before the Court, more than any other case brought to its attention, merits a positive reaffirmation of the constitutional right of freedom of the press. The case before the Court is more compelling than the *New York Times* case, which involved the press' treatment of a police commissioner in connection with a civil rights demonstration; or the *Butts* case, which involved the *Saturday Evening Post's* article on the charge that Coach Wally Butts, of the University of Georgia, had conspired to fix a football game; or the *Rosenbloom* case, where a radio station was challenged for its coverage of the arrest of the distributor of a nudist magazine.

Therefore, upon consideration of the documentation before the Court, the briefs and the oral argument, the Court grants defendants' motion. Counsel for defendants to prepare and serve proposed attorney order.

DATED: November 19, 1975.

THOMAS W. LESAGE
Judge of the Superior Court

APPENDIX B

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

ORIGINAL FILED

Apr-5 1976

John J. Corcoran, Acting County Clerk
J. R. Piper, Deputy

No. C 124,901

RANCHO LA COSTA, INC., a Nevada corporation, et al.,

Plaintiffs,

vs.

PENTHOUSE INTERNATIONAL, LTD., a corporation, et al.,

Defendants.

MEMORANDUM AND NOTICE OF INTENDED DECISION

A review of the law in this case begins with *New York Times* and ends with *Time Inc.* v. *Firestone.*

In *New York Times* v. *Sullivan* (1964), 376 U.S. 254 11 L.Ed.2d 686, the United States Supreme Court considered the limitations upon state libel laws imposed by the constitutional guarantee of freedom of speech and of the press. *New York Times* held in a civil libel action by a public official against a newspaper that those guarantees require clear and convincing proof that a defamatory falsehood alleged as libel was published with "knowledge that it was false or with reckless disregard of whether it was false or not." (11 L.Ed.2d 706.)

The same requirement was later held to apply to "public figures" who sued in libel on the basis of alleged defamatory falsehoods. *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130 18 L.Ed.2d 1094.

In the application of the *Times* and *Curtis* principles, subsidiary rules were from time to time announced. *New York Times* itself specified that the burden is on the plaintiff to show malice with "convincing clarity" (285-286). Further in *Times* the court specified the need to make an individual examination of the whole record so that "the judgment does not constitute a forbidden intrusion on the field of free expression" (285). *Time* further stated that mere negligence on the part of the publisher is insufficient to show malice (288).

The most significant application of the *Time-Curtis* rule was reached in *Rosenbloom* v. *Metromedia,* 403 U.S. 29. In *Rosenbloom* the plurality of the court ruled that the New York Times "knowing or reckless falsity standard" applied in a state civil libel action brought not by a "public official" or a "public figure" but by a private individual for a defamatory falsehood published in a news broadcast by a radio station about the individual's involvement in an event of "public or general concern" or "interest."

In *Gertz* v. *Walsh,* 418 U.S. 323, the court retreated from *Rosenbloom,* holding "Absent clear evidence of *general fame* or *notoriety* in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life. It is preferable to reduce the public-figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation." (41 L.Ed.2d 812)

Justice Powell in *Gertz* further theorized with respect to *New York Times* and *Curtis* as follows: "The New York Times standard defines the level of constitutional protection appropriate to the context of defamation of a public person. Those who, by reason of the *notoriety* of their achievements or the vigor and success with which they seek the public's attention, are properly classed as public figures and those who hold governmental office may recover for injury to reputation only on clear and convincing proof that the dafamtory falsehood was made with knowledge of its falsity or with reckless disregard for the truth. This standard administers an extremely powerful antidote to the inducement to media self-censorship of the common-law rule of strict liability for libel and slander." (41 L.Ed.2d 806).

Finally, in *Time Inc.* v. *Firestone,* a current majority of the United States Supreme Court (further reflecting an ambivalent mood to freedom of the press) denied "public figure" status to the plaintiff Mary Firestone, who the court said did not assume any role of a special prominence in the affairs of society other than perhaps Palm Beach society nor did she thrust herself to the forefront of any particular public controversy in order to influence the resolution of the issues involved in it. The court declined to extend the *Curtis* rule to the Firestone divorce case, declining to equate "public controversy" with controversies of "interest to the public." Justice Powell, concurring, asserted in *Firestone* that the *Firestone* court adhered to the principles of *Gertz.* He further contended that it was evident from the variety of views expressed among the justices that perceptions differed to the application of the *Gertz* principles "to this bizarre case" (the *Firestone* case).

The court notes here that neither *Gertz* nor *Firestone* excludes the application of the public-figure principle to individuals whose achievements have attracted notoriety or general fame in the community (*Gertz,* pp. 812, 806).

The federal courts have recognized the constitutional interest which makes the summary judgment procedure

appropriate in public-figure, public-official libel controversies. *Time* v. *McLaney,* 406 Fed.2d 565; *Washington Post* v. *Keogh,* 365 Fed.2d 965; *United Medical Laboratories* v. *Columbia Broadcasting System Inc.,* 404 F.2d 706 (9th Cir. 1968), *cert. den.,* 89 S.Ct. 1197 (summary judgment for defendant); *Time* v. *Pape,* 401 U.S. 279, 28 L.Ed.2d 45 (1971) (directed verdict for defendant); *Cerrito* v. *Time, Inc.,* 302 F.Supp. 1071 (N.D. Cal. 1969) (summary judgment for defendant); *Baldine* v. *Sharon Herald Co.,* 391 F.2d 703 (3d Cir. 1968) (judgment n.o.v. for defendant).

The California courts have also approved summary judgments in this area of the law. In the leading case of *Belli* v. *Curtis Publishing Corp.,* 25 Cal.App.3d 384, attorney Belli sued Curtis for an allegedly libelous article regarding Mr. Belli's participation as defense counsel in the Jack Ruby trial. The trial court granted the defendant's motion for summary judgment, giving effect to the constitutional principles announced by the United States Supreme Court in *New York Times* and in *Curtis.*

During the course of its opinion, the *Belli* court stated:

> "In *New York Times* the court stated, 'This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied.' (376 U.S. 254, 285 [11 L.Ed.2d 686, 709]. See also *Rosenbloom* v. *Metromedia, supra,* 403 U.S. 29, 55 [29 L.Ed.2d 296, 318].)
>
> "In adopting the foregoing rule, and rejecting the contention that truth alone should be a defense, the court in *New York Times* observed: 'A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount —leads to . . . "self-censorship." Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred. . . . Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so . . . The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments.' (376 U.S. at p. 279, fn. omitted [11 L.Ed.2d at p. 706].)" 25 Cal.App.3d, at 389.

Mr. Belli had stipulated that he was a "public figure" and that the trial of Jack Ruby was a matter of "public interest" (p. 388), a stipulation made improvident four years later by *Firestone.*

On the other hand, summary judgment must be denied where triable issues of fact are presented on the issues of malice or public-figure standing. *Goldwater* v. *Ginzburg,* 414 F.2d 324; *Buckley* v. *Esquire, Inc.,* 344 F.Supp. 1133.

Gertz and *Firestone* revive the importance, perhaps ultimately critical in this case, of state libel rules. As held in *Gertz,* "The . . . states may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." (347).

In *People* v. *Disbrow,* 16 Cal.3d 101 (2-6-76), the California Supreme Court announced a determination to define constitutional rights in accordance with the California Constitution even though at variance with constitutional evaluations of the United States Supreme Court in the same area of the law. In *Disbrow,* the California Supreme Court rules: "We pause finally to reaffirm the independent nature of the California Constitution and our responsibility to separately define and protect the rights of Cali-

fornia citizens despite conflicting decisions of the United States Supreme Court interpreting the federal Constitution."

Another group of cases must be briefly noted. In these cases the evaluation of the allegedly libelous material has been influenced by the *Times* principle. Thus, in *Greenbelt* v. *Bresler,* 398 U.S. 610, plaintiff Bresler was seeking to obtain a rezoning of land from the City Council of Greenbelt, Maryland. At a City Council meeting the plaintiff's negotiating posture was characterized as "blackmail." The defendant later reported that comment in its newspaper. In ruling that the use of the word "blackmail" was, as a matter of constitutional law, not defamatory, the Supreme Court opined:

> "For the reasons that follow, we hold that the imposition of liability on such a basis was constitutionally impermissible—that as a matter of constitutional law, the word 'blackmail' in these circumstances was not slander when spoken, and not libel when reported in the Greenbelt News Review. . . . It is simply impossible to believe that a reader who reached the word 'blackmail' in either article would not have understood exactly what was meant: It was Bresler's public and wholly legal negotiating proposals that were being criticized. No reader could have thought that either the speakers at the meetings or the newspaper articles reporting their words were charging Bresler with the commission of a criminal offense. On the contrary, even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler's negotiating position extremely unreasonable. Indeed, the record is completely devoid of evidence that anyone in the City of Greenbelt or anywhere else thought Bresler had been charged with a crime."

Also:

Yorty v. *Chandler,* 13 Cal.App.3d 467, 474-475 (1970);

Thuma v. *Hearst Corporation,* 340 F.Supp. 867, 871-872 (1972);

Time Inc. v. *Johnston,* 448 F.2d 378, 384-385 (4th Cir. 1971).

The foregoing cases are but illustrative of the general rule that freedom of the press and speech on public issues should be uninhibited, robust, and wide-open and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government, public officials and public figures. See *Terminiello* v. *Chicago,* 337 U.S. 1, 493 L.Ed. 1131, 1134, 69 S.Ct. 894; *De Jonge* v. *Oregon,* 299 U.S. 353, 365, 81 [376 U.S. 271].

And, of course, the United States Supreme Court approves the ligitimate state interest underlying the law of libel in the compensation of individuals for the harm inflicted on them by defamatory falsehood. *Gertz* v. *Welch,* 418 U.S. 323, 341.

In view of the rulings hereinafter announced in this Memorandum, only a brief observation with respect to the PENTHOUSE article need be now made. The central theme of the authors is the alleged entente from time to time and from place to place between legal business and suspect funds, a theme of national concern since at least the days of the Kefauver Committee. For, as argued by the author of one of the books in evidence, "The lines between legal and illegal activity become blurred at times, especially in areas involving high finance."[1]

Further, LA COSTA is a cultural and economic phenomenon of this society. As disclosed by evidence from both sides in this case, such a phenomenon attracts visitors,

---

[1] Messick—"Lansky"

features personalities of the sports, entertainment and political worlds and inevitably provokes journalistic interest and comments, favorable and unfavorable. The constitutional right of freedom of the press would, indeed, be feeble if it should be precluded from fair comment and probing on such matters. However, as already noted, the standards governing such comments have significantly changed from *Rosenbloom* to *Firestone* on the federal level, and remain to be authoritatively defined on the state level.

The Court has considered in complete detail all the briefs, motions, pleadings, exhibits and evidence in this case. Based upon that review and the authorities above cited, and many others, the Court now states its intended ruling in this case:

1. The motions of defendants for summary judgment with respect to the plaintiffs Moe Dalitz and Allard Roen are granted on all the grounds urged on the merits, but not on the grounds relating to alleged failure to disclose material evidence (discovery motions). *Gertz* v. *Welch, supra; New York Times* v. *Sullivan,* 376 U.S. 254. (See articles in Time, February 19, 1951; Readers Digest, September 1961; Saturday Evening Post, November 11, 1961; Time, March 2, 1970; Atlantic, August 1970; Los Angeles Times, November 2, 1965, October 14, 1965, May 4, 1973; articles in the New York Times, April 26, 1958, March 20, 1962; and many other articles in the principal newspapers and journals in the United States contained as exhibits to Affidavit of Alan M. Gelb, Public Figure File No. 2, and many other articles and books identified in the evidence.) Plaintiffs Dalitz and Roen are clearly public figures under all of the authorities, and said plaintiffs have failed to show malice. *New York Times* v. *Sullivan,* supra.

2. The motions for summary judgment with respect to all other plaintiffs must be denied. Triable issues arise under the *Firestone* case; also, the juxtaposition of the firearms and graphics accompanying the Penthouse article is a factor in the Court's decision on this phase of the case.

3. The order of submission made February 26, 1976, with respect to the parties' discovery motions is vacated. The Court will re-hear those motions on noticed motions of either party, after consulation with the Court as to an appropriate hearing date.

4. Rulings set forth with respect to summary judgment motions are notice of intended rulings only. The Court reserves full jurisdiction to change, modify or vacate such rulings. Counsel are instructed to file any objections or concurrence they may have to the intended rulings within thirty (30) days from the date of this order. Counsel should not attempt to cover all points extensively discussed and briefed in this case. The Court would indicate interest in analysis and summary not exceeding twenty (20) pages for each side of this case. The intended ruling shall become effective and final only after further written order of this Court following the thirty (30)-day period for objection and comments.

This Memorandum and Notice of Intended Decision shall constitute notice to all parties.

Dated: April 5, 1976.

Thomas W. LeSage
Judge of the Superior Court

APPENDIX C

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

No. C 124,901

RANCHO LA COSTA, INC., a Nevada corporation, et al.,

Plaintiffs,

vs.

PENTHOUSE INTERNATIONAL, LTD., a corporation, et al.,

Defendants.

ORDER

The Court has reviewed all briefs and memoranda filed with respect to its Notice of Intended Decision dated April 5, 1976.

That decision shall become effective on the date of this Order. The Court only adds that a necessary premise of the intended decision and this Order is that there are triable issues of fact with respect to whether or not all the plaintiffs (except Mr. Dalitz and Mr. Roen) are public figures.

It is evident to the Court that special consideration must be given to discovery issues in this case. The Court, therefore, instructs and orders all counsel to confer with the objective of reaching a stipulation with respect to all discovery in the following months, including the time and place of contemplated depositions, the order of requests for inspection of documents and the order to be followed in the submission and answers to interrogatories, and all other pertinent matters pertaining to discovery. Counsel are re-

quested and instructed to present said stipulation, for consideration and approval by the Court, within thirty (30) days of this date.

This Order shall constitute notice to all parties.

DATED: June 25, 1976.

THOMAS W. LESAGE
Judge of the Superior Court

Appendix C.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DEPT.

Date July 2, 1976

Honorable Thomas W. LeSage Judge
Honorable Judge Pro Tem
20 Deputy Sheriff

E. Ellis Deputy Clerk 80
None Reporter
(Parties and counsel checked if present)

C 124901

Rancho LaCosta, Inc., etc., et al

vs

Penthouse International Ltd., etc., et al

Counsel for Plaintiff — Phillips, Nizer, Benjamin, Krim & Ballon
Simon & Sheridan

Counsel for Defendant — Buchalter, Nemar, Fields & Savitch
by J. Dito (x)

Finley, Kumble, Wagner, BT
Heine, Underberg & Grutman,
Norman Roy Grutman
Alan M. Gelb

Paul, Hastings & Janofsky
by D. C. Conroy (x)

Nature of Proceedings.
Order re Notice of Intended Decision dated April 5, 1976

Appendix C.

The order dated June 25, 1976, and filed this date, was hand delivered in open court this morning (July 2, 1976), to Mr. Dito and Mr. Conroy. The Court orders the clerk to forward a copy of said order to all counsel of record this date. Notwithstanding the date on said order, it shall become effective July 2, 1976, and shall be deemed dated July 2, 1976.

In accordance with the order filed this date, the intended decision dated April 5, 1976, shall become effective this date.

A copy of this minute order and a copy of the order filed this date is sent to all counsel by U. S. mail.

☐ OFF CALENDAR
☐ On court's own motion
☐ No Appearance
☐ At request of moving party
☐ By Stipulation

AM
☐ CONTINUED TO ..... IN DEPT ..... AT .....
PM

☐ On court's own motion
☐ Stp. to be filed
☐ On oral/written stipulation
☐ REQUEST OF
☐ Moving party
☐ Respondent(s)
☐ TRO to remain in full force and effect
☐ TRO dissolved

Appendix C.

☐ TRANSFERRED TO/FROM DEPARTMENT .....
☐ Court disqualifies itself
☐ 170.6 CCP affidavit filed
☐ IT IS STIPULATED that Commissioner .....
may hear this matter as Judge Pro Tem.
☐ NOTICE:
☐ Waived
☐ By moving party
☐ By respondent(s)
☐ TO STAND SUBMITTED .....

20 Dept. 80

MINUTES ENTERED
July 2, 1976
COUNTY CLERK

APPENDIX D

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE

2d Civ. No. 49846
(L.A.S.C. No. C 124901)

ORDER

COURT OF APPEAL—SECOND DIST.
FILED
DEC 10 1976
CLAY ROBBINS, JR. *Clerk*

.....
Deputy Clerk

PENTHOUSE INTERNATIONAL, LTD., a corporation; ROBERT GUCCIONE; LOWELL BERGMAN; and JEFF GERTH,
Petitioners,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES,
Respondent.

RANCHO LA COSTA, INC., A Nevada corporation; LA COSTA LAND COMPANY, an Illinois corporation; LA COSTA MANAGEMENT COMPANY, a California corporation; LA COSTA COMMUNITY ANTENNA SYSTEM, INC., a California corporation; PARADISE HOMES, INC., a California corporation; MERV ADELSON, IRWIN MOLASKY, ALLARD ROEN and M. B. DALITZ,
Real Parties in Interest.

Appendix D.

THE COURT:

The petition for writ of mandate, filed November 5, 1976, has been read and considered. The court has also read and considered the statement in opposition, filed December 1, 1976. Judicial notice has been taken of the contents of this court's file in 2d Civil No. 47612, entitled *Rancho La Costa, Inc.* v. *Superior Court.*

It appearing that there is a sufficient colorable showing of a question of fact so that this court cannot conclude that the respondent court has acted in excess of jurisdiction, the petition is denied.

APPENDIX E

ORDER DUE
January 7, 1977

ORDER DENYING HEARING
AFTER JUDGMENT BY THE COURT OF APPEAL
2nd District, Division 1, Civ. No. 49846

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

PENTHOUSE INTERNATIONAL, LIMITED, ETC. et al., Petitioners

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent
RANCHO LA COSTA, INCORPORATED, ETC. et al., RPI

Petition for hearing DENIED.

SUPREME COURT
FILED
Jan 5 1977
G. E. Bishel, Clerk

Wright
Chief Justice

I.G.E. Bishel, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of an order of this Court, as shown by the records of my office.

Witness my hand and the seal of the Court this day of Mar 25 1977.

By G E S
Deputy Clerk